(7)

Supreme Court, U.S.
FILED
AUG 19 1994
OFFICE OF THE CLERK

No. 93-248

In the Supreme Court of the United States

OCTOBER TERM, 1994

SHARON JOHNSON, PETITIONER

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ROBERT V. ZENER
WILLIAM G. COLE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

25 pp

QUESTION PRESENTED

Whether petitioner established a claim of constructive discharge under the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Aviles-Martinez v. *Monroig*, 963 F.2d 2 (1st Cir. 1992) 12

Bourque v. *Powell Electrical Mfg. Co.*, 617 F.2d 61 (5th Cir. 1980) 12

Bristow v. *Daily Press, Inc.*, 770 F.2d 1251 (4th Cir. 1985), cert. denied, 475 U.S. 1082 (1986) 7, 17, 18

Brooms v. *Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989) 12

Buckley v. *Hospital Corp. of America*, 758 F.2d 1525 (11th Cir. 1985) 12

Clark v. *Marsh*, 665 F.2d 1168 (D.C. Cir. 1981) 15, 16

Daniels v. *Essex Group, Inc.*, 937 F.2d 1264 (7th Cir. 1991) 12

Dashnaw v. *Pena*, 12 F.3d 1112 (D.C. Cir. 1994), petition for cert. pending, No. 93-2073 17

Derr v. *Gulf Oil Corp.*, 796 F.2d 340 (10th Cir. 1986) 11, 14-15, 16

EEOC v. *Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992) 17

Goss v. *Exxon Office Sys. Co.*, 747 F.2d 885 (3d Cir. 1984) 11, 18

Gray v. *York Newspapers, Inc.*, 957 F.2d 1070 (3d Cir. 1992) 13

Greenberg v. *Hilton Int'l Co.*, 870 F.2d 926 (2d Cir. 1989) 12

Henry v. *Lennox Indus., Inc.*, 768 F.2d 746 (6th Cir. 1985) 12

Cases—Continued: Page

Holsey v. *Armour & Co.*, 743 F.2d 199 (4th Cir. 1984), cert. denied, 470 U.S. 1028 (1985) 7, 12, 18
Hopkins v. *Price Waterhouse*, 825 F.2d 458 (D.C. Cir. 1987), rev'd, 490 U.S. 228 (1989) 11, 16, 17
Hukkanen v. *International Union of Operating Engineers Local No. 101*, 3 F.3d 281 (8th 1993) 14, 15, 16, 18
Johnson v. *Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981) 12, 14, 15, 17
Muller v. *United States Steel Corp.*, 509 F.2d 923 (10th Cir.), cert. denied, 423 U.S. 825 (1975).... 15
Nolan v. *Cleland*, 686 F.2d 806 (9th Cir. 1982).... 12
Paroline v. *Unisys Corp.*:
879 F.2d 100 (4th Cir. 1989) 18
900 F.2d 27 (4th Cir. 1990) 18
Pittman v. *Hattiesburg Mun. Separate School Dist.*, 644 F.2d 1071 (5th Cir. 1981) 11-12
Schafer v. *Board of Pub. Educ.*, 903 F.2d 243 (3d Cir. 1990) 18
Simpson v. *Federal Mine Safety & Health Review Comm'n*, 842 F.2d 453 (D.C. Cir. 1988) 12, 16, 17
Smith v. *Cleburne County Hosp.*, 870 F.2d 1375 (8th Cir.), cert. denied, 493 U.S. 847 (1989).... 12
Watson v. *Nationwide Ins. Co.*, 823 F.2d 360 (9th Cir. 1987) 11
Yates v. *Avco Corp.*, 819 F.2d 630 (6th Cir. 1987).. 12

Statutes:

Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* 11, 13
Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* (Supp. IV 1992) 13
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 6, 11, 12, 13
Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*....6, 8, 11, 12, 13
5 U.S.C. App. 10(e) 2
42 U.S.C. 1983 11

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-248

SHARON JOHNSON, PETITIONER

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 991 F.2d 126. The memorandum opinion of the district court (Pet. App. 15a-44a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1993. A petition for rehearing was denied on May 17, 1993. Pet. App. 12a-14a. The petition for a writ of certiorari was filed on August 16, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed by the National Institutes of Health (NIH) within the Department of Health and Human Services (HHS) from 1979 until August, 1986, when she resigned. From 1984 on, she was the Executive Secretary of the Pathobiochemistry Study Section in NIH's Division of Research Grants in Bethesda, Maryland. The Study Section is made up of scientists who review applications to NIH for biomedical research grants. As Executive Secretary, petitioner was required to organize and attend meetings of the Study Section, prepare reports of the meetings, and visit grant applicants. In addition, she was required to chair the Study Section meetings and be present for their entirety. See 5 U.S.C. App. 10(e), at 1179; Pet. App. 3a, 16a, 18a, 27a.

During her employment at NIH, petitioner suffered from two health problems. She had a form of narcolepsy that caused her to be chronically sleepy. She also had cardiac arrhythmia, a condition that causes an erratic, rapid heartbeat. The heart condition prevented her from taking the medications normally prescribed for narcolepsy. As a result of her narcolepsy, petitioner had to take naps during the day. On several occasions, she fell asleep during Study Section meetings. Pet. App. 3a, 17a; see also Tr. 4, 269-270.

Petitioner's health problems were made more difficult by commuting problems. After moving to Annapolis, Maryland, in 1982, petitioner had an hour-long drive to Bethesda twice each day. Because of her narcolepsy, petitioner often had to pull off the road during her morning commute for 15-

minute naps, causing her sometimes to arrive at work late. Pet. App. 3a-4a, 17a.

In August, 1985, petitioner wrote to her immediate supervisor, Dr. Asher Hyatt, requesting two accommodations to her handicaps: *first*, that she be given flexible starting and ending times for work; and, *second*, that she be allowed to change her regularly scheduled working hours more frequently than the officially permitted dates of July 1 and December 1, so as to take advantage of seasonal traffic patterns. Pet. App. 4a, 18a. To support her request, petitioner gave Dr. Hyatt a letter from her physician stating that petitioner "need[ed] to have flexible working hour schedule with due regard given to possible late arrival and late departure." *Id.* at 4a. Alternatively, the doctor said that flexible hours would not be necessary "[i]f [petitioner] were given a regular work schedule wherein she could participate in a car pool arrangement [and] * * * would not be responsible for driving to and from work." *Ibid.*

After consulting with his supervisor and NIH's Occupational Medical Services (OMS), Dr. Hyatt sent petitioner a memorandum stating "[t]he only further accommodation I can make is to the hours of a carpool." Pet. App. 4a; see *id.* at 20a-21a. At about the same time, petitioner and other NIH employees were told that under a new "flextime" policy, they could arrive up to 15 minutes after their scheduled starting time, if they made up the time at the end of the day. *Id.* at 4a-5a. In addition, petitioner was permitted to change her work schedule four times a year, even though other employees could change their schedules only twice a year. *Id.* at 5a, 11a.

Petitioner joined a carpool, but it did not completely solve her problems. On the days that she was responsible for driving, her commute took longer than before. In addition, she could not use the carpool every day. Petitioner did not, however, convey her dissatisfaction to Dr. Hyatt. Pet. App. 5a, 20a-22a.

In February, 1986, petitioner asked Dr. Hyatt to allow her to stay at a hotel in Bethesda for two nights at government expense during a three-day Study Section meeting at the hotel. Dr. Hyatt denied the request, as it was contrary to NIH policy. Pet. App. 5a.

On April 7, 1986, petitioner requested five weeks of leave without pay, to begin two days later, on April 9. Accompanying that request was a letter from her clinical psychologist stating that petitioner needed the time off because of physical and psychological exhaustion, which the psychologist attributed to the stress of her job and her commute. The request was approved by Dr. Friedman, petitioner's second-level (and Dr. Hyatt's immediate) supervisor, on the condition that petitioner first finish certain work left over from the most recent Study Section meeting and some other work required before the next round of meetings. Petitioner began an extended period of leave without pay in late April, 1986. Pet. App. 5a-6a, 23a-24a.

Four days after requesting extended leave without pay, petitioner requested 52 hours of advance sick leave (*i.e.*, sick leave that she had not yet accumulated), 29 hours of which she had already taken before making the request. Dr. Hyatt authorized the leave she had already taken but told her that in the future she would have to comply with NIH rules by requesting the advance sick leave in writing before

she took it. When, shortly thereafter, petitioner again took advance sick leave without first requesting it in writing, the time was subtracted from her annual leave. Pet. App. 5a-6a, 23a.

In May, 1986, Dr. Thomas Goldman, a psychiatrist, wrote a letter on petitioner's behalf to the executive director of the Study Section, James Pike. Goldman said in his letter that petitioner did "not appe[a]r to have the resources to adapt effectively to the stress level in her work environment." Pet. App. 6a. He also said that he found it "doubtful that a truly reasonable accommodation can be provided her." *Id.* at 7a. He said that "the best alternative from the medical standpoint would be retirement." *Ibid.* Later in May, 1986, petitioner asked for, and was granted, an extension of her leave without pay. *Ibid.*

On June 4, 1986, petitioner applied for a disability retirement. 991 F.2d at 130.[1] On June 5, Dr. Hyatt wrote an evaluation of petitioner, backdated to April 1, 1986, describing her performance as unsatisfactory. *Ibid.* Dr. Hyatt admitted at trial that the evaluation did not accurately reflect his views; he wrote it in the belief that petitioner's attorney had approved the preparation of a negative evaluation for the limited purpose of supporting petitioner's application for disability retirement. See *ibid.*; Tr. 1131-1132, 1138, 1142, 1147 (testimony of Hyatt); see also Tr. 1222, 1242-1245 (testimony of Pike). In preparing the evaluation, Dr. Hyatt cut out petitioner's signature from a prior evaluation form, taped it on the new

---

[1] We cite the reported version of the court of appeals' opinion at this point because petitioner's appendix omits (Pet. App. 7a) the paragraph of the opinion to which this portion of our statement relates.

form, and photocopied the page. The falsified signature indicated that petitioner had reviewed the expectations formulated for her position. (It in no way suggested that she had reviewed the adverse appraisal.)[2] The evaluation was first shown to petitioner during a psychiatric examination performed by CMS at NIH's request while she was on leave. Pet. App. 7a, 26a.

In early August, 1986, petitioner met with an NIH official to discuss possible reassignment. The official offered her a position at GS-13, one grade lower than her GS-14 position as Executive Secretary, which she declined.[3] On August 20, 1986, petitioner resigned. She was later awarded disability retirement benefits. Pet. App. 7a, 26a-28a.

2. Petitioner filed this action against the Secretary of HHS in the United States District Court for the District of Maryland, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* After a bench trial, the district court rejected her Title VII claim but entered judgment in her favor on the Rehabilitation Act claim. Pet. App. 7a-8a.

In upholding the Rehabilitation Act claim, the district court first held that NIH had not provided "reasonable accommodation" to petitioner's handicaps.[4]

---

[2] The government acknowledged on appeal that Hyatt's action was "wrong and a serious mistake." 991 F.2d at 130.

[3] The parties disputed whether she was offered the same salary for the GS-13 position as she was then receiving for her GS-14 position. Pet. App. 7a.

[4] The district court had previously held in pretrial rulings that petitioner was entitled to reasonable accommodation un-

The court found that, although petitioner had 15 minutes of flexibility in her arrival time for work, she had requested 30 minutes, and that it would not have been unduly burdensome for NIH to have given her 30 minutes' leeway. Pet. App. 31a-35a. The court further found that petitioner "was not provided with reasonable accommodation with regard to her requests for leave to attend to medical problems." *Id.* at 35a. Finally, the court found that "there was some degree of coercion in [NIH's] 'request' that [petitioner] be evaluated at OMS." *Id.* at 36a. The court expressly declined, however, to hold that the evaluation was illegal, as petitioner had contended. *Ibid.*

The district court further held that petitioner had been constructively discharged. The court began by observing that under Fourth Circuit precedent "[a] constructive discharge occurs when 'an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job.'" Pet. App. 36a, quoting *Bristow* v. *Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985), cert. denied, 475 U.S. 1082 (1986), quoting *Holsey* v. *Armour & Co.*, 743 F.2d 199, 209 (4th Cir. 1984), cert. denied, 470 U.S. 1028 (1985). Applying that precedent, the court first determined that petitioner's working conditions were intolerable, primarily because "[h]er employers failed to provide her with the accommodation she required and did not seriously consider her for any alternative positions." Pet. App. 37a. In addition, the court noted that "[a]fter filing for disability, [petitioner] was pressured to submit to psychiatric

---

der the Rehabilitation Act, because she was an "individual with handicaps" who was "otherwise qualified" for her job within the meaning of the Act. Pet. App. 30a.

evaluations, at which she found out that her supervisor had written an extremely negative appraisal of her." *Ibid.* Under those circumstances, the court believed, "a reasonable person * * * may well have felt compelled to resign." *Ibid.* The court next determined that the evidence supported the inference that NIH intended to force her to quit. The court reasoned: "[petitioner's] supervisors had ample notice over several months that she needed some changes in her working conditions; however, they failed to act to help her." *Id.* at 38a.

The district court ordered that petitioner be placed in an "appropriate position" at her previous grade-level and awarded her approximately $57,000 in damages. Pet. App. 41a.

3. On appeal, the government challenged only the district court's holding that petitioner had been constructively discharged. The Fourth Circuit reversed. Pet. App. 1a-11a.

The Fourth Circuit held that "the district court erred as a matter of law in grounding its finding of constructive discharge upon the premise that NIH failed to afford [petitioner] reasonable accommodation." Pet. App. 10a. The Fourth Circuit concluded that, in order to prove a constructive discharge, the plaintiff in a Rehabilitation Act case must do more than show that the employer's accommodation to the plaintiff's handicaps "falls short of satisfying the requirements of the * * * Act." *Ibid.* Instead, in a "case of partial or imperfect accommodation," the plaintiff "must present some evidence that the employer intentionally sought to drive her from her position." *Id.* at 10a, 11a. Such an intention, the court said, "can be demonstrated by actual evidence * * * or circumstantial evidence." *Id.* at 8a. The court

specified that circumstantial evidence of intent may include "a complete failure to accommodate [an employee's handicaps], in the face of repeated requests." *Id.* at 11a.

The Fourth Circuit held that the evidence was insufficient to show that NIH acted with the intention to drive petitioner from her position. The court observed that "NIH did not ignore [petitioner's] requests [for accommodation]—NIH responded, but frequently in ways that she found unsatisfactory." Pet. App. 10a. The court found (*ibid.*):

> Rather than the thirty-minutes flexibility in her starting time that [petitioner] requested, NIH gave her fifteen. She was authorized to join a carpool, but without the regularized hours that she wanted. NIH granted her initial request for Leave Without Pay, albeit under the condition that she complete certain necessary work before departure. NIH also offered [petitioner] a different position, but [petitioner] refused it because it was at a lower grade. In other instances, NIH complied fully with [petitioner's] requests, permitting her to change duty hours four times a year instead of twice like other employees, and later granting her extended Leave Without Pay.

The court further found that "[t]he evaluation falsified by Hyatt, while plainly inexcusable, fails to demonstrate an intent by NIH to force [petitioner] from her position because the evaluation was prepared only after [petitioner] herself requested disability retirement." *Id.* at 11a. The court concluded that petitioner's evidence "may well demonstrate a lack of flexibility or magnanimity on the part of her supervisors, but what it does not demonstrate is a deliberate intent to force [petitioner] from her job." *Ibid.*

ARGUMENT

Petitioner challenges (Pet. 4-11) the Fourth Circuit's rejection of her claim of constructive discharge under the Rehabilitation Act. We believe that the Fourth Circuit's decision would be erroneous if read as (1) holding that, to establish such a claim, a plaintiff must prove that her employer intended to force her to quit; or (2) suggesting that the standard for proving a constructive discharge under the Rehabilitation Act should be more stringent than the standard applicable under other employment discrimination statutes. However, there is a narrower, valid ground for upholding the Fourth Circuit's judgment,[5] and, in

---

[5] In the court of appeals, the government primarily argued that the district court erred by holding that NIH's failure to make a reasonable accommodation to petitioner's handicap, standing alone, amounted to a constructive discharge. Gov't C.A. Br. 19-20. We continue to believe that an employer's failure to make a reasonable accommodation to an employee's handicap (followed by the employee's resignation) does not automatically compel the conclusion in every case that the employee has been constructively discharged. We also continue to believe that the district court erred in relying upon such a per se rule. The Fourth Circuit's decision, however, could be read to go farther than simply rejecting the per se rule upon which the district court relied. Indeed, the government argued in the Fourth Circuit that, under that court's precedent, constructive discharges occur only when there has been a deliberate attempt to force an employee to quit. Gov't C.A. Br. 26. The Fourth Circuit's decision and the position that the government took below on the issue of intent have been the subject of broad consultation within the Executive Branch, especially in light of recent decisions rejecting an intent standard in other circuits, discussed pp. 14-17 *infra*. As a result of this consultation, the government no longer takes the position that a finding of intent to force an employee to leave

addition, we believe further review is unwarranted for the reasons set forth below.

1. The Fourth Circuit's decision does not conflict with any decision of this Court or that of any other court of appeals regarding the proper interpretation of the Rehabilitation Act. Indeed, petitioner does not cite (and we are not aware of) any other decision in which a court of appeals has even addressed the standard for proving a claim of constructive discharge under that Act. The absence of a conflict among the circuits (and the absence of any other appellate case law) on the question presented here weigh heavily against further review.

Petitioner asserts that "[t]here is a sharp split among the circuits as to the proper standard for establishing a constructive discharge in employment discrimination cases." Pet. 4. In support of that assertion, petitioner cites decisions involving claims of constructive discharge under statutes other than the Rehabilitation Act. See Pet. 4-9 & nn.2-3, 5. The overwhelming majority of those decisions arise under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[6] A Rehabilitation Act case is not an

---

is required in order to support a conclusion of constructive discharge.

[6] Of the 17 decisions cited by petitioner in support of her claim of a conflict, 14 arise under Title VII, one arises under the Age Discrimination in Employment Act, and two arise under 42 U.S.C. 1983. See Pet. 4 n.2, citing *Hopkins* v. *Price Waterhouse*, 825 F.2d 458, 472 (D.C. Cir. 1987) (Title VII), rev'd on other grounds, 490 U.S. 228 (1989); *Watson* v. *Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987) (Title VII); *Derr* v. *Gulf Oil Corp.*, 796 F.2d 340, 343-344 (10th Cir. 1986) (Title VII); *Goss* v. *Exxon Office Sys. Co.*, 747 F.2d 885, 887 (3d Cir. 1984) (Title VII); *Pittman* v. *Hatties-*

appropriate context in which to resolve a conflict that has arisen under *other* employment discrimination laws, primarily Title VII.

Moreover, this Rehabilitation Act case would be a particularly inappropriate vehicle for resolving the asserted conflict. In its decision, the Fourth Circuit expressly declined to follow case law involving other employment discrimination statutes. The court determined that "[t]he traditional standard of constructive discharge," which "has evolved in cases of age, sex and race discrimination," does "not neatly translate to the context of the Rehabilitation Act." Pet. App. 8a-9a. In light of that determination, if this Court granted further review in this case to resolve the

---

burg Mun. Separate School Dist., 644 F.2d 1071, 1077 (5th Cir. 1981) (Title VII); *Aviles-Martinez* v. *Monroig*, 963 F.2d 2, 6 (1st Cir. 1992) (Section 1983); *Greenberg* v. *Hilton Int'l Co.*, 870 F.2d 926, 932, 935-936 (2d Cir. 1989) (Title VII); *Buckley* v. *Hospital Corp. of America*, 758 F.2d 1525 (11th Cir. 1985) (age discrimination); *Brooms* v. *Regal Tube Co.*, 881 F.2d 412, 423-424 (7th Cir. 1989) (Title VII); *Daniels* v. *Essex Group, Inc.*, 937 F.2d 1264 (7th Cir. 1991) (Title VII); Pet. 5 n.3, citing *Holsey* v. *Armour & Co.*, 743 F.2d 199, 208-209 (4th Cir. 1984) (Title VII); *Johnson* v. *Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981) (Title VII); Pet. 6, citing *Yates* v. *Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (Title VII), and *Henry* v. *Lennox Indus., Inc.*, 768 F.2d 746, 752 (6th Cir. 1985) (Title VII); Pet. 8, citing *Nolan* v. *Cleland*, 686 F.2d 806, 812-814 (9th Cir. 1982) (Title VII), and *Bourque* v. *Powell Electrical Mfg. Co.*, 617 F.2d 61, 65-66 (5th Cir. 1980) (Title VII); Pet. 9 n.5, citing *Smith* v. *Cleburne County Hosp.*, 870 F.2d 1375, 1380-1381 (8th Cir.) (Section 1983), cert. denied, 493 U.S. 847 (1989). See generally *Simpson* v. *Federal Mine Safety & Health Review Comm'n*, 842 F.2d 453, 461-463 & nn.8-9 (D.C. Cir. 1988) (citing and discussing constructive discharge claims under Title VII and other employment discrimination statutes).

asserted conflict, the Court would have to address the question whether the standard for proving constructive discharge in cases arising under Title VII and other employment discrimination statutes should apply in cases arising under the Rehabilitation Act.[7] While we believe that the standard for proving a constructive discharge under the Rehabilitation Act should not differ from the standard applicable under other employment discrimination statutes, this Court need not address that novel question, on which there is no conflict, without the benefit of any lower court decisions on the question aside from the decision below.[8]

2. Further review is also unwarranted because the asserted conflict among the lower courts on the standard for proving a claim of constructive discharge under the employment discrimination laws has stead-

---

[7] As noted above, the vast majority of decisions concerning the standard for proving a constructive discharge arise under Title VII.

[8] Cf. *Gray* v. *York Newspapers, Inc.*, 957 F.2d 1070, 1079 n.5 (3d Cir. 1992) (stating, without elaboration, that "the doctrine of constructive discharge is the same in all employee discrimination claims such as those under the [Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*]"), cited at Pet. 4 n.1.

Petitioner cites (Pet. 6) the recently enacted Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* (Supp. IV 1992), as an example of a statute under which a claim of constructive discharge may be made. The enactment of that statute increases the significance of the question whether a uniform standard of proving a constructive discharge should apply under the federal employment discrimination laws, and also increases the likelihood that the lower federal courts will have opportunities to address that question before it is necessary for this Court to do so.

ily abated and may well abate entirely without the need for review by this Court.

a. The Fourth Circuit is now alone among the circuits in appearing to require a plaintiff claiming constructive discharge to prove that her employer intended to force her to quit. That was not always the case. On the contrary, three other circuits initially appeared to require proof of intent but rejected that requirement in later decisions.

As petitioners point out (Pet. 9 n.5), "the Eighth Circuit concur[red] in the Fourth Circuit's 'deliberate intent' requirement" in *Johnson* v. *Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981). The Eighth Circuit there stated that a constructive discharge encompasses two requirements: (1) that "a reasonable person [in the employee's position] would find conditions intolerable"; and (2) that "the employer's actions must have been taken with the intention of forcing the employee to quit." *Ibid.* The court held that the plaintiff had failed to meet the second requirement, because the evidence "rebut[ted] any inference that [the employer's] handling of [the plaintiff] was done with the intention of forcing him to resign." *Ibid.*

In *Hukkanen* v. *International Union of Operating Engineers Local No. 101*, 3 F.3d 281 (1993), however, the Eighth Circuit took a different view. The Eighth Circuit in that case said, "Our language in *Bunny Bread* does not mean constructive discharge plaintiffs must prove their employers consciously meant to force them to quit." *Hukkanen*, 3 F.3d at 284. The court explained that "[w]hen an employer denies a conscious effort to force an employee to resign * * *, the employer must necessarily be held to intend the reasonably foreseeable consequences of its actions." *Ibid.*, citing *Derr* v. *Gulf Oil Corp.*, 796

F.2d 340, 344 (10th Cir. 1986), and *Clark* v. *Marsh*, 665 F.2d 1168, 1175 n.8 (D.C. Cir. 1981). The court accordingly held that "if [the plaintiff's] resignation was a reasonably foreseeable consequence of [her employer's sexual] harassment, [the employer's] 'actions [were necessarily] taken with the intention of forcing [the plaintiff] to quit.'" *Hukkanen*, 3 F.3d at 285, quoting *Bunny Bread*, 646 F.2d at 1256.

In construing its precedent not to require proof of intent, the Eighth Circuit followed a path already traveled by the Tenth Circuit and the D.C. Circuit. In *Muller* v. *United States Steel Corp.*, 509 F.2d 923, cert. denied, 423 U.S. 825 (1975), the Tenth Circuit reversed the district court's ruling that the plaintiff in a Title VII case had been constructively discharged, finding that the employer's actions "were not designed to coerce [the plaintiff's] resignation." 509 F.2d at 929. The court thus held that "the proof of constructive discharge fail[ed]" as a result of the "dearth of evidence to show a deliberate effort [by the employer] to make things difficult for the employee so as to bring about his separation." *Ibid.*

The Tenth Circuit subsequently "clarifi[ed] * * * the standard for finding a constructive discharge" in *Derr*, 796 F.2d at 344, cited in *Hukkanen*, 3 F.3d at 284. The court in *Derr* recognized that "some language in *Muller* * * * suggests that our focus may once have been on the explicit subjective intent of the employer to force the employee to leave." *Derr*, 796 F.2d at 344. The court determined, however, that the focus should be "on an objective standard." *Ibid.* The court specified that the proper inquiry "is simply whether the employer by its illegal discriminatory acts has made working conditions so difficult that a

reasonable person in the employee's position would feel compelled to resign." *Ibid.*

The Tenth Circuit in *Derr* explained that its "shift in emphasis" from a subjective, employer-focused inquiry to an objective, employee-focused one "is consistent with the District of Columbia Circuit's observation that '[t]o the extent that [the employer] denies a conscious design to force [the employee] to resign, we note that an employer's subjective intent is irrelevant; [*the employer*] *must be held to have intended those consequences it could reasonably have foreseen.*' " 796 F.2d at 344, quoting, with emphasis, *Clark* v. *Marsh*, 665 F.2d at 1175 n.8. That is the same observation upon which the Eighth Circuit relied in announcing a similar "shift in emphasis" in *Hukkanen*, 3 F.3d at 284.

Notwithstanding the observation in *Clark* upon which the Eighth and Tenth Circuits relied, other language in *Clark* suggested that proof of intent was required. See 665 F.2d at 1173 (quoting with approval language from *Muller* requiring proof of intent and stating that "a finding of constructive discharge depends on [whether the employer] deliberately made * * * working conditions intolerable and drove [the employee] into an involuntary quit") (internal quotation marks omitted; bracketed material supplied by court in *Clark*). The D.C. Circuit recognized as much in later decisions. See *Simpson* v. *Federal Mine Safety & Health Review Comm'n*, 842 F.2d 453, 462 (D.C. Cir. 1988) ("selected passages from *Clark* * * * suggest that employer intention is relevant to the constructive discharge doctrine this circuit employs under Title VII"); *Hopkins* v. *Price Waterhouse*, 825 F.2d 458, 472 (D.C. Cir. 1987) (district court's "literal interpretation" of

language in *Clark* that, "taken at face value, * * * sets forth a stringent standard," was "misplaced" in light of later decisions that "have rejected the notion that the employer must have the specific intent of forcing the employee to quit"). Accordingly, the D.C. Circuit in later decisions has "expressly rejected a motivation test" in favor of an inquiry into "[w]hether conditions are so intolerable that a reasonable person would feel compelled to resign." *Simpson*, 842 F.2d at 462-463; see *Hopkins*, 825 F.2d at 472.[9]

b. In light of the evolution of the law of constructive discharge in the Eighth, Tenth, and D.C. Circuits, it is by no means certain that the Fourth Circuit will apply a stringent intent requirement in future employment discrimination cases.

The Fourth Circuit has looked to the law of those other three circuits in prior cases involving constructive discharge. In the decision below, for example, the Fourth Circuit drew support for an intent requirement from the Eighth Circuit's decision in *Bunny Bread* and its own prior decisions in *EEOC* v. *Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992), and *Bristow* v. *Daily Press, Inc.*, 770 F.2d 1251 (4th Cir. 1985). Pet. App. 8a. *Clay Printing* and *Bristow*, in turn, also cited *Bunny Bread* in support of an intent requirement. *Clay Printing*, 955 F.2d at 944; *Bristow*, 770 F.2d at 1255. *Bristow* relied (770 F.2d at 1255), in addition, on the Tenth Circuit's decision

---

[9] Cf. *Dashnaw* v. *Pena*, 12 F.3d 1112, 1115 (D.C. Cir. 1994) (mere fact of intentional discrimination does not suffice to prove constructive discharge in the absence of "aggravating factors"), petition for cert. pending, No. 93-2073 (filed June 22, 1994).

in *Muller* and the D.C. Circuit's decision in *Clark*. As discussed above, however, the circuits that decided *Bunny Bread*, *Muller*, and *Clark* have all construed those decisions not to require proof of intent. It is difficult to believe that the Fourth Circuit will not take cognizance of that fact and, having done so, either clarify that it is in accord with the other circuits or acknowledge the conflict. If it takes the latter course, review by this Court might well be appropriate. In view of the trend in other circuits, however, further review at this time would be premature.[10]

3. Finally, this case is also a poor factual vehicle for further review of the question presented by the

---

[10] The rejection of an intent requirement in other circuits is not the only reason for believing that the Fourth Circuit will resolve the asserted conflict itself. As petitioner observes, insofar as the decision below appears to impose a stringent intent requirement, it "departs significantly from the standard previously established by * * * the Fourth Circuit." Pet. 10. In two prior decisions, the Fourth Circuit has stated that an employer's intent to force an employee to quit "may be inferred through * * * a failure to act in the face of known intolerable conditions." *Bristow*, 770 F.2d at 1255; accord *Holsey* v. *Armour & Co.*, 743 F.2d 199, 209 (4th Cir. 1984), cert. denied, 470 U.S. 1028 (1985). That statement closely resembles statements by circuits that petitioner claims are in conflict with the Fourth Circuit. See, *e.g.*, *Goss* v. *Exxon Office Sys. Co.*, 747 F.2d at 888 (Third Circuit decision stating that, to prove constructive discharge, "[t]he court need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign"), cited in Pet. 4 n.2; accord *Hukkanen*, 3 F.3d at 284-285; *Schafer* v. *Board of Pub. Educ.*, 903 F.2d 243, 249 (3d Cir. 1990); but cf. *Paroline* v. *Unisys Corp.*, 879 F.2d 100, 113-114 (1989) (Wilkinson, J., dissenting), dissenting opinion adopted in relevant part by en banc court, 900 F.2d 27, 28 (4th Cir. 1990).

petition. The question, as petitioner frames it, is "whether a showing of deliberate intent [on the part of an employer to force an employee to quit] is a mandatory element of a constructive discharge claim." Pet. 8. Petitioner argues that no such showing should be required, because "an employer who creates intolerable working conditions which it fails to correct demonstrates that it intends to force the resignation of employees afflicted by the intolerable conditions." *Ibid.* Thus, adequate consideration of the question framed by petitioner depends heavily on the existence of intolerable working conditions.

Although the government did not challenge on appeal the district court's holding that petitioner's working conditions were intolerable, the evidence supporting that holding was weak. That weakness, moreover, appears to have influenced the Fourth Circuit's analysis of the intent issue, as illustrated by the passage quoted in the margin.[11] Although we did not contend

---

[11] Pet. App. 10a-11a:

> [W]e believe the district court erred as a matter of law in grounding its finding of a constructive discharge upon the premise that NIH failed to afford [petitioner] reasonable accommodation. The evidence here is insufficient to show a deliberate intent to discharge an employee when there has been an attempt to accommodate that same employee, even though the accommodation falls short of satisfying the requirements of the Rehabilitation Act. The plaintiff must present some evidence that the employer intentionally sought to drive her from her position.
>
> In this case, [petitioner] failed to meet this burden. NIH did not ignore [petitioner's] requests—NIH responded, but frequently in ways that she found unsatisfactory. Rather than the thirty-minutes flexibility in her starting time that [petitioner] requested, NIH gave her fifteen. She was authorized to join a carpool, but without

in the court of appeals that the district court committed clear error in finding that petitioner's working conditions were intolerable, the existence of intolerable working conditions is nevertheless too dubious in this case to permit adequate consideration of the question whether the existence of such conditions amounts to a constructive discharge in the absence of an intent to have the employee leave.

---

the regularized hours that she wanted. NIH granted her initial request for Leave Without Pay, albeit under the condition that she complete certain necessary work before departure. NIH also offered [petitioner] a different position, but [petitioner] refused it because it was at a lower grade. In other instances, NIH complied fully with [petitioner's] requests, permitting her to change duty hours four times a year instead of twice like other employees, and later granting her extended Leave Without Pay. NIH could have done more, and should have done more to conform to the requirements of the Rehabilitation Act, but it did not simply turn its back on [petitioner's] needs. Finally, once [petitioner] requested disability retirement, a solution urged by her own psychiatrist, personnel at NIH tried to help her obtain approval for her application. The evaluation falsified by Hyatt, while plainly inexcusable, fails to demonstrate an intent by NIH to force [petitioner] from her position because the evaluation was prepared only after [petitioner] herself requested disability retirement. The evidence put forth by [petitioner] may well demonstrate a lack of flexibility or magnanimity on the part of her supervisors, but what it does not demonstrate is a deliberate intent to force [petitioner] from her job. NIH tried, but failed, to accommodate [petitoner's] handicaps.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ROBERT V. ZENER
WILLIAM G. COLE
Attorneys

AUGUST 1994

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 301157 86196